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Summary record of the 3085th meeting*

Held at the Palais Wilson, Geneva, on Friday, 18 July 2014, at 10 a.m.

Chairperson: Sir Nigel Rodley

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* No summary record was prepared for the 3084th meeting.

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The meeting was called to order at 10.05 a.m.

Organizational and other matters

Draft general comment No. 35 on article 9 of the Covenant (continued)
(CCPR/C/GC/R.35/Rev.3)

1. **The Chairperson** expressed sadness at the tragic loss of hundreds of lives in the crash of the Malaysian Airlines flight over Ukraine the day before. He asked Mr. Flinterman to convey to the appropriate authorities in the Netherlands the deepest condolences of the Committee.

2. Turning to draft general comment No. 35, he said that a number of members had held consultations on a revised text for paragraph 15, which would be presented the following week. He invited the Committee to resume its consideration of the draft paragraph by paragraph.

Paragraph 16

3. **Mr. Neuman** (Rapporteur for the general comment) said that no comments had been received in relation to paragraph 16.

4. *Paragraph 16 was adopted.*

Paragraph 17

5. **Mr. Neuman**, referring to the submissions received following the call for comments, said that Switzerland had questioned the wording of the first sentence. He recalled that the Committee had invested considerable effort in drafting that sentence to reflect the fact that detention should not punish people for engaging in actions that the Covenant protected. However, some rights under the Covenant were subject to limitations and using detention in the context of permissible limitations was sometimes appropriate. The Committee was not trying to imply that every violation of any other right connected in some way to a detention made the detention arbitrary. Switzerland proposed referring, in the first sentence, to the exercise of "any rights guaranteed by the Covenant" and omitting the examples. It also criticized the reference in the penultimate sentence to enforced disappearance as a particularly aggravated form of arbitrary detention, which suggested that there were degrees of arbitrariness.

6. Amnesty International recommended that the Committee should enter more into the substance of particular articles, such as the rights of whistleblowers under article 19 and the rights of sex workers under article 17. However, he believed that those were substantive issues that belonged in other general comments. Another source suggested adding concluding observations on the issue of gender identity to footnote 59, but they were not concluding observations based on article 9. However, as some of the concluding observations already cited in that footnote did refer to gender identity, he proposed adding parenthetical remarks in the footnote to that effect.

7. **Ms. Chanet** supported the amendment proposed by the Rapporteur. Regarding the Swiss proposal, she said that the examples listed in the paragraph were in fact very relevant, and she was also in favour of maintaining the reference to enforced disappearances. Referring to the third sentence, she proposed specifying "Retroactive criminal punishment involving detention".

8. **The Chairperson** said he took it that the Committee agreed to the proposals made by the Rapporteur and Ms. Chanet.

9. *It was so decided.*

10. **Mr. Fathalla** said that, for the sake of clarity, the first sentence should refer to "legitimate exercise of the rights guaranteed by the Covenant".

11. **Mr. Neuman** recalled that the current wording was "the legitimate exercise of rights as guaranteed by the Covenant" in order to make clear that what the State was doing went beyond the permissible limitations on the rights. That careful phrasing of the sentence had been decided on in response to concerns raised during the first reading. If the addition of "the" was intended to cover "all" rights, it would be problematic. The intention had been to indicate that particular list of examples, without necessarily precluding any others. The examples had been carefully selected to match the list used by the Working Group on Arbitrary Detention to define what was arbitrary in its work.

12. **The Chairperson** said that he understood Mr. Neuman's concern but noted that the reference was to the "exercise" of rights, and there were only a limited number of rights that were exercised by volition of the individual, which hardly stretched beyond the fundamental freedoms already listed.

13. **Mr. Neuman** said that he would be willing to endorse the addition of the definite article and accept whatever risks as to future violations it might create.

14. *It was so decided.*

15. **Mr. Vardzelashvili**, referring to the second sentence, suggested replacing "may also be arbitrary" with "will also be arbitrary".

16. **Mr. Neuman** said that the relationship between the discriminatory grounds and the detention could take a number of different forms. Clearly, the Committee wanted to indicate that there were certain frontal relationships between article 26 and a detention that made the resulting detention arbitrary, but in his view not necessarily every contribution of article 26 to a detention produced arbitrary detention. For example, detention as a result of an inequality in the decisions of a prosecutor as to which cases went to the ordinary courts and which to a special court for prosecution was not necessarily arbitrary.

17. **The Chairperson** recalled that the situation referred to by the Rapporteur had arisen in a communication dealt with by the Committee at the current session, in which it had found that the inequality had produced a violation of the Covenant, but not of article 9.

18. **Mr. Shany** asked whether, if the decision to detain an individual was based on discriminatory grounds, the Committee could still say that it was a reasonable decision that was not arbitrary. It appeared to be almost tautological; if the decision to detain was in violation of the Covenant, it was necessarily arbitrary. He was not opposed in principle to using cautious language, but in that case he felt that the Committee should take a stronger position.

19. **Ms. Chanet** agreed with Mr. Shany that if the detention was found to be based on discriminatory grounds, it was necessarily arbitrary. The only doubt would be in relation to whether it was actually discriminatory or not, given that there could be differences in treatment that did not amount to discrimination.

20. **Ms. Seibert-Fohr** expressed concern that the Committee might be faced with problems in relation to *ratione temporis* and should be careful about overreaching itself.

21. **Mr. Shany** said it was true that when the Committee was engaging with cross-violations there could be complications. When trying to introduce conceptual clarity into what constituted a violation, the Committee could not weigh those kinds of considerations in terms of how they would affect future cases and *ratione temporis*. The question was whether a violation of the Covenant could ever be regarded as an act that was not arbitrary in nature for the purpose of other provisions of the Covenant that were immediately influenced by those acts.

22. **Mr. Kälin** said that he agreed with the Rapporteur about the need to exercise caution. He agreed that in most cases where there were discriminatory grounds arbitrary detention was involved, but there might be some cases that were not so clear. For example, a possible case might involve a person who had committed a crime and was arrested as a result of racial profiling. Although racial profiling was certainly discriminatory, the fact that the individual had been identified through that practice did not mean that there were not grounds for detaining them.

23. **The Chairperson** suggested replacing "may also be" with "will in principle be" in the second sentence.

24. **Mr. Vardzelashvili** said that the Chairperson's proposal seemed to partially resolve the issue, but his concern was with the words "in violation of article 2, paragraph 1, … or article 26". If it was found that racial profiling, for example, was in violation of the Covenant, it would be difficult to understand why it was not arbitrary to detain the person.

25. **Ms. Chanet** said that the case of arrest on the basis of racial profiling did not correspond exactly to arrest on discriminatory grounds, but rather to arrest involving discriminatory elements. Thus, if the wording "may also be arbitrary" were retained, the beginning of the sentence should refer to "arrest or detention involving discriminatory elements", whereas if the wording "will in principle be arbitrary" were used, the original reference to "arrest or detention on discriminatory grounds" could be kept.

26. **Mr. Neuman** said that the solution proposed by the Chairperson would give the Committee the possibility to draw distinctions in the future, which was what he was trying to preserve.

27. **Mr. Rodríguez-Rescia** recalled that the hypothesis was detention or arrest on discriminatory grounds. Those discriminatory grounds would be in violation of a given number of articles of the Covenant. Arrest or detention on discriminatory grounds per se was necessarily arbitrary, and the Committee could not simply say that it might be arbitrary.

28. **Mr. Iwasawa** proposed amending the Chairperson's solution slightly, so that the end of the sentence would read "is also in principle arbitrary".

29. **Mr. Rodríguez-Rescia** said that he would favour the existing text.

30. **Ms. Waterval** said that she supported the proposal by Ms. Chanet to refer to detention involving discriminatory elements.

31. **Mr. Salvioli** said that he did not understand how the Committee could state that detention in violation of article 2, paragraph 1, or article 3 "may" be arbitrary.

32. **Mr. Vardzelashvili**, noting that the footnote indicated a case in which the Committee had not found a violation, asked whether it might be possible to omit the reference to violation of the specific article of the Covenant.

33. **Ms. Chanet** said that if the wording "involving discriminatory elements … may also be arbitrary" were used, the reference to violation of articles of the Covenant would have to be removed.

34. **Ms. Majodina** said that, regardless of how it was worded, if the reference was to arrest or detention relating to discrimination, articles 2, 3 or 26 would have to be mentioned and the detention should be described as "arbitrary", without using the words "may be".

35. **Mr. Neuman** said that, although the reference to discriminatory elements was familiar to some members of the Committee, it would not be familiar to many readers of the general comment. It was necessary to use a formulation that allowed the references to specific articles of the Covenant to be retained in order to be consistent with the rest of the

paragraph. He would therefore support the proposal by Mr. Iwasawa, which was more protective than the original formulation.

36. **The Chairperson** said he took it that the Committee agreed to Mr. Iwasawa's proposal.

37. *Paragraph 17, as amended, was adopted.*

Paragraph 18

38. **Mr. Neuman** said that paragraph 18 concerned detention for the control of immigration. He agreed with Australia's suggestion to insert a reference to article 3, paragraph 1, of the Convention on the Rights of the Child in footnote 67, but not with its statement that the reference to a "brief initial period" for which asylum seekers could be detained for documentation purposes was too prescriptive.

39. The United Kingdom suggested extending the reasons for detaining asylum seekers at the time of entry and therefore proposed amending the second sentence to read: "Asylum seekers may be detained for a limited period in order to examine the person, to document their entry, record their claims, and to determine their identity and immigration status if it is in doubt". Such wording would, however, encourage the unnecessary detention of asylum seekers and the existing sentence did not preclude other situations in which detention might be necessary. The United Kingdom also objected to the requirement to determine individual risks of absconding or offending where the asylum seeker's claim was being considered under a prioritized or fast-track system. While the UNHCR Detention Guidelines tolerated an overall assessment of risk in cases of "manifestly unfounded" applications, the Committee should nevertheless insist on an individualized determination of risk for all situations. In addition, the United Kingdom objected to the penultimate sentence which stated that migrants should not be detained in prisons, as it considered that detention in prisons was appropriate in exceptional circumstances, such as when a migrant had committed a crime or posed a threat to national security. The existing sentence referred, however, not to low security but to a non-punitive regime, and should therefore remain.

40. The United States objected to the requirement for individualized determination for all types of detentions, which was contrary to the Committee's view.

41. The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families had submitted a list of principles, which were mostly consistent with paragraph 18. Principle 5, however, stipulated that children and adolescents should never be deprived of liberty because of their migration status, which was contrary to the Committee's case law and its individualized approach. The case law nonetheless indicated that detention of minors should be a last resort and for as short a period as possible. Principle 6 provided that no criminal sanctions should be imposed for migration violations, which was beyond the scope of the present general comment.

42. He did not accept the objection by a confidential source to the notion that asylum seekers could be held in immigration detention pending a decision on their claims if they presented "a danger of crimes against others". A second confidential source suggested alternatives to the detention of asylum seekers. In that regard, he proposed adding a footnote citing the UNHCR Detention Guidelines, where alternatives could be found. A third confidential source suggested extending the discussion on procedures relating to detention in prisons and detention conditions, but the word limit on the general comment precluded that. He proposed that the Committee should accept a suggestion from a fourth confidential source to explicitly mention that statelessness preventing the expulsion of an individual did not justify his or her indefinite detention by inserting the phrase "because of statelessness or other obstacles" in the final sentence. A last confidential source requested further discussion of information that should be provided to migrants, including their right

to contact and be contacted by UNHCR, but such information was best placed in paragraph 58.

43. The Child Rights Information Network suggested that the fifth sentence should be replaced with a sentence stating that children should never be detained for immigration purposes. It also suggested that the following paragraph on children should be added: "States parties must take appropriate measures to ensure that any form of deprivation of liberty of children is used only as a measure of last resort and for the shortest appropriate period of time taking into account their best interests as a primary consideration". The views on children expressed in paragraph 18 would thus be explicitly stated in full in a separate paragraph and reflect combined articles 3 and 37 of the Convention on the Rights of the Child. If the Committee agreed to such a paragraph, he proposed that it should be inserted immediately after paragraph 18.

44. **Mr. Bouzid** said that a separate paragraph was needed to stress that children must not be detained under any circumstances and that other means must be found to deal with that vulnerable group.

45. **Ms. Chanet** said that she supported all Mr. Neuman's suggestions. The draft general comment already fulfilled the request from a confidential source for more information on alternatives to detention in the clause stating that the decision "must take into account less invasive means of achieving the same ends" (fourth sentence). She proposed the addition of the words "physical and" before the words "mental health" in the sixth sentence.

46. **Mr. Rodríguez-Rescia** proposed deleting from the third sentence the words "danger of crimes against others, or risk of acts against national security" in response to a suggestion by Amnesty International, as they stigmatized refugees and asylum seekers and encouraged their detention. He agreed with the proposal to add a separate paragraph on children. In addition, and in line with a suggestion from the University of Essex Human Rights Centre Clinic, reference should be made to unaccompanied minors because such children were in a particularly urgent and vulnerable situation.

47. **Ms. Majodina** supported the proposal to add a separate paragraph on children and to include information on unaccompanied minors. She proposed amending the fifth sentence of paragraph 18 so that it began "Children should, in principle, not be detained" in order to bring the Committee's position close to that of the Committee on the Rights of the Child.

48. **Mr. Iwasawa** proposed the addition of the word "See" at the beginning of footnote 68. He asked whether the two cases that the Committee had addressed in its concluding observations on Australia were relevant to footnote 70 and could therefore be inserted.

49. **Mr. Shany** said he would like to hear further reasons for Mr. Rodríguez-Rescia's proposal to delete the words "danger of crimes against others, or risk of acts against national security", since the Committee's concern related to a non-individualized decision-making process rather than the ability of a State to order detention where there was a risk to national security.

50. **Mr. Neuman** said the UNHCR Detention Guidelines recognized that "Governments may need to detain a particular individual who presents a threat to national security" and required such detentions to be "necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight". The *Ahani v. Canada* case cited in footnote 65 had involved an Iranian national who had stated that he had been a member of the Iranian intelligence services trained in assassination and that if he were returned to Iran his life would be endangered since he had defected. In that context, Canada had detained him pending the decision on his asylum claim. The Committee needed to allow for the possibility of detaining asylum seekers on the basis of facts about them, pending the

resolution of their claims. He was therefore not in favour of the deletion proposed by Mr. Rodríguez-Rescia. He proposed changing the emphasis of the sentence on the deprivation of liberty of children so that it read "Children should not be deprived of liberty except as a measure of last resort".

51. **The Chairperson**, speaking as a member of the Committee, said that any information on unaccompanied minors should be inserted in a separate paragraph about children, if such a paragraph was adopted. If the paragraph was not adopted, he suggested adding 'and also taking account of the extreme vulnerability and need for care of unaccompanied minors" at the end of the fifth sentence in order to take into consideration the comments made by the Child Rights Information Network among others.

52. **Mr. Neuman** supported the Chairperson's suggestion, which could be added regardless of whether a separate paragraph on children was adopted.

53. He recapitulated the proposed amendments to paragraph 18: the addition of a reference to article 3, paragraph 1, of the Convention on the Rights of the Child to footnote 67; the addition of a footnote citing the UNHCR Detention Guidelines; the addition of "physical and" immediately before "mental health"; the addition of the word "See" at the beginning of footnote 68; the replacement of the words "Children may be deprived of liberty only as a measure of last resort" with "Children should not be deprived of liberty except as a measure of last resort"; the addition of "and also taking account of the extreme vulnerability and need for care of unaccompanied minors" at the end of the fifth sentence; and the addition of "because of statelessness or other obstacles" after the word "individual" in the last sentence. He would determine the relevance of the cases regarding Australia to footnote 70 before deciding on whether to add them.

54. *Paragraph 18, as amended, was adopted.*

The meeting was suspended at 11.40 a.m. and resumed at 12.10 p.m.

55. **Mr. Neuman** said that the Child Rights Information Network had suggested the following text for a paragraph on the detention of children in general, to be inserted after paragraph 18: "States parties must take appropriate measures to ensure that any form of deprivation of liberty of children is used only as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration". That text provided an accurate description of what was required under the Convention on the Rights of the Child. He was not opposed to its inclusion.

56. **The Chairperson** said that, if the new text was adopted, the fifth sentence in paragraph 18 should be deleted since the two were almost identical.

57. **Mr. Iwasawa** said that, in principle, he was not opposed to the new paragraph but recalled that the purpose of general comments was to draw on the Committee's own experience on the basis of communications and consideration of reports. Moreover, the examples cited in footnote 67 were formulated in stronger language than that contained in article 37 (b) of the Convention on the Rights of the Child, as well as being based on the Committee's own experience. He would be reluctant to create a new paragraph.

58. **The Chairperson** said that the issue might relate more to article 24 of the Covenant than to article 9.

59. **Ms. Majodina** agreed with Mr. Iwasawa that a general comment should be an interpretation of the Committee's own experience, but she nonetheless thought that a separate paragraph should be devoted to the rights of children in detention.

60. **Ms. Chanet** concurred. In view of the *Popov v. France* case heard by the European Court of Human Rights, which had involved the detention of very young children, she considered that the paragraph should contain references not only to article 9 of the

Covenant but also to articles 24 and 7. It was not appropriate to refer to the issue of children in the middle of a paragraph relating to adults.

61. **Mr. Flinterman** said that such a paragraph should be placed before paragraph 18. The text should be based on that proposed by the Child Rights Information Network but also based on the Committee's own practices. He requested the Rapporteur to draft a text along those lines.

62. **Mr. Kälin** said that he saw no need for a separate paragraph. However, the fifth sentence could be moved to the end of the paragraph to show that the Committee was not conflating the various issues. He, too, would welcome a draft text on which the Committee could base its decision.

63. Following a discussion in which **Ms. Majodina**, **Ms. Chanet**, **Ms. Waterval** and **Mr. Kälin** took part, **the Chairperson** asked for a show of hands on whether the rights of children in detention in situations not relating to immigration should be covered in a separate paragraph.

64. *The addition of a separate paragraph was approved by 9 votes to none.*

65. **The Chairperson** asked the Rapporteur to consider whether such a paragraph should precede paragraph 18 or, as suggested by Ms. Chanet, appear later in the draft general comment and relate to a number of different articles.

66. **Mr. Neuman** said that it was for the Committee to decide. The section of the draft currently under consideration related to arbitrary detention, but a separate paragraph could be extended to refer to the rights of children in detention generally. He noted that there were scattered references to children throughout the draft comment. If the paragraph were placed later in the draft, he would have more time to prepare a text.

67. **Ms. Chanet** said that Mr. Neuman's approach was the right one. Consideration should also be given to the unaccompanied children of migrants, but the Committee had no experience of its own in that regard in the form of relevant communications.

68. **The Chairperson** said that the new paragraph under consideration related to children not in the context of migration. The question was therefore whether the Committee should adopt a simple text, as read out by Mr. Neuman, or a longer, more detailed text. His fear was that the Committee had insufficient practical experience for the latter approach. He suggested that Mr. Neuman should use the NGO text as a starting point and gather suggestions from colleagues to reflect the discussion.

69. **Mr. Seetulsingh** asked whether that would mean that the scattered references to children's rights in the text would be deleted.

70. **Mr. Neuman** said that the references should be retained. It would not be wise to leave all issues relating to children to a single final paragraph.

71. **The Chairperson** said he took it that the Committee would wait for the Rapporteur to provide a new text at the next session, with contributions from other Committee members.

72. *It was so decided.*

Paragraph 19

73. **Mr. Neuman** said that there had been a number of comments on paragraph 19. Ireland wanted the Committee to clarify the meaning of the word "harm" in the second sentence, presumably with a view to having the term include failure to treat the condition of the detained person concerned. The United States objected to the reference to necessity and proportionality. Another source wanted the Committee to include a reference to a person's

sexual orientation and gender identity in order to clarify the point that people should not be detained to force them to change such orientation or identity. In his view, if that issue was addressed, it should not be in paragraph 19, but he did not propose that it should be addressed. Most of the comments related to differences between the Committee's views and those of the Committee on the Rights of Persons with Disabilities, which favoured an absolute prohibition on involuntary hospitalization. The latter Committee took an absolute position on a number of issues that the former saw differently and it also had a different concept of discrimination. The Human Rights Committee viewed differential treatment on certain grounds as impermissible without a strong justification, whereas the Committee on the Rights of Persons with Disabilities viewed differential treatment on the grounds of disability as impermissible per se. A submission from the United Nations Special Rapporteur of the Commission for Social Development and the Committee on the Rights of Persons with Disabilities also expressed concerns about the drafting of the paragraph. One NGO wished to see a discussion of involuntary medication, with a view to its absolute prohibition, and in that connection he noted that, in March 2014, the Committee had adopted concluding observations that had not gone so far as to insist on the absolute prohibition of such a measure.

74. The Committee thus had three choices: it could advocate the absolute prohibition of detention on mental health grounds, it could say that involuntary hospitalization was permissible only when necessary, or it could delete the paragraph and say nothing. In the absence of the Committee's advocacy of absolute prohibition, the Committee on the Rights of Persons with Disabilities and some NGOs preferred the third option.

75. **Mr. Kälin** said that human rights were evolving and the emergence of new treaties created a need for harmonization. The original treaties, however, remained in place and it was a challenge to adapt a text adopted decades earlier. Care was needed: the Convention on the Rights of Persons with Disabilities went beyond the requirements of article 9 of the Covenant and the Committee needed time to develop its approach. It would be better to delete paragraph 19 and, perhaps later on, draft a separate general comment on the human rights of persons with disabilities in the context of the Covenant.

76. **Mr. Shany** said that he strongly disagreed. The rights of persons with disabilities were not a new issue for the Committee and the deletion of the paragraph would send the message that such rights did not enter into the corpus of civil and political rights. The Committee should acquaint itself with other developments, but it would be a mistake to duck the issue. Even if the Committee did not accept the position of some NGOs concerning total prohibition, it was an important principle under article 14 of the Covenant that disability should never constitute grounds for deprivation of liberty. The principle should be made explicit. If the text of the paragraph was strengthened, the Committee could accommodate some of the concerns raised about the Committee's jurisprudence.

77. **Ms. Seibert-Fohr** concurred. Such questions should not be avoided. As far as harmonization was concerned, there was not necessarily any contradiction between the various human rights treaties just because some instruments might set higher standards than others. The paragraph should be retained and, indeed, strengthened.

78. **Mr. Seetulsingh** pointed out that, in paragraph 3 of the draft general comment, the Committee specifically mentioned persons with disabilities among the groups whose rights could be threatened.

79. **Mr. Rodríguez-Rescia** said that, if retained, paragraph 19 should be in the nature of a general guideline. He suggested that the current text should be preceded by an introductory sentence along the following lines: "States parties should revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention". Later in the

paragraph it should encourage appropriate measures of deinstitutionalization and family support. States could then be left to develop their own criteria and policies.

80. **Mr. Bouzid** and **Mr. Vardzelashvili** said that they were in favour of retaining the paragraph.

81. **The Chairperson** said that there was a clear consensus on including a paragraph on the rights of persons with disabilities. Members of the Committee should suggest amendments to the Rapporteur, who should also take into account the text proposed by Mr. Rodríguez-Rescia.

The meeting rose at 1 p.m.